

SERVICE DATE – OCTOBER 1, 2014

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35783

FLORIDA DEPARTMENT OF TRANSPORTATION—PETITION FOR DECLARATORY
ORDER—RAIL LINE OF CSX TRANSPORTATION, INC. BETWEEN RIVIERA BEACH
AND MIAMI, FLA.

Digest:¹ The Florida Department of Transportation (FDOT) does not need Board authorization under 49 U.S.C. § 10901 to continue to own the physical assets of a railroad line between Riviera Beach and Miami, Fla., and to assume responsibility for dispatching and maintaining the line. The current freight rail carrier, CSX Transportation, Inc., will retain the sole right and legal obligation to provide freight service and FDOT will not be able to unreasonably interfere with that service. FDOT's assumption of freight dispatching and maintenance responsibility will not cause FDOT to become a rail carrier under the Interstate Commerce Act.

Decided: September 30, 2014

On May 6, 2014, the Florida Department of Transportation (FDOT), a noncarrier, filed a petition for declaratory order asking the Board to declare that FDOT's continued ownership of the physical assets of approximately 81 miles of rail line between Riviera Beach and Miami, Fla. (South Florida Line) and its proposed assumption of dispatching and maintenance responsibility for the South Florida Line does not require Board authorization under 49 U.S.C. § 10901. FDOT states that it acquired the South Florida Line from CSX Transportation, Inc. (CSXT) in 1988 to facilitate the development of the "Tri-Rail" commuter rail service in south Florida, and after significant capital improvements over the last 25 years, the line now efficiently hosts frequent Tri-Rail, CSXT freight service, and National Railroad Passenger Corporation (Amtrak) intercity passenger service. In its petition, FDOT states that CSXT holds a perpetual, exclusive freight easement over the South Florida Line and seeks a determination that, under Maine Department of Transportation—Acquisition & Operation Exemption—Maine Central Railroad (State of Maine), 8 I.C.C. 2d 835 (1991), FDOT's continued ownership of the physical assets of the South Florida Line and its proposed assumption of dispatching and maintenance responsibility do not

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

require Board authorization under 49 U.S.C. § 10901 and would not cause FDOT to become a rail carrier within the meaning of 49 U.S.C. § 10102(5).

Exercising our discretionary authority under 49 U.S.C. § 721 and 5 U.S.C. § 554(e), we will issue a declaratory order to remove uncertainty in this matter. As discussed below, we will grant FDOT's request for a declaratory order. Based on our review of the transaction documents, we find that the transaction would not be the acquisition of a railroad line that would require Board authorization under 49 U.S.C. § 10901 or an exemption under 49 U.S.C. § 10502, and would not cause FDOT to become a rail carrier under the Interstate Commerce Act.

BACKGROUND

FDOT is a governmental agency of the State of Florida and a noncarrier. In 1988, FDOT acquired the physical assets of the South Florida Line from CSXT pursuant to a Contract for Installment Sale and Purchase (Sale Contract) and a Warranty Deed.² The sale preceded the State of Maine decision, and the Interstate Commerce Commission (ICC)—the Board's predecessor agency—did not issue a formal determination regarding the transaction.³ FDOT states that, pursuant to the 1988 transaction, CSXT retained an exclusive, perpetual freight easement on the South Florida Line, and that CSXT continued to provide dispatching and maintenance on the line pursuant to an Operating and Management Agreement – Phase A (OMAPA).⁴

FDOT acquired the South Florida Line to facilitate the initiation of Tri-Rail commuter service, which began operations in January 1989.⁵ FDOT and the South Florida Regional Transportation Authority (SFRTA), a state agency⁶ and the operator of Tri-Rail, have invested approximately \$466 million to upgrade the South Florida Line, including significant double-tracking, improving signals, and constructing a new bridge near Fort Lauderdale.⁷ Today, SFRTA operates 50 daily weekday Tri-Rail commuter trains (25 in each direction) and 30 daily

² Pet. 8-9. The parties also executed a Supplemental Warranty Deed on March 28, 1990. Pet. 9. FDOT states that the Supplemental Warranty Deed provided a more specific legal description of the property but did not change the language describing the easement. Id. References to the Warranty Deed also cover the Supplemental Warranty Deed.

³ Pet. 3. FDOT asserts that ICC staff informally indicated that no agency action was contemplated in connection with the transaction.

⁴ Pet. 3.

⁵ Pet. 4.

⁶ Fla. Stat. § 343.53 (2014).

⁷ Pet. Ex. 1 at 3.

weekend trains (15 in each direction), Amtrak operates four daily passenger trains (two in each direction), and CSXT operates an average of 10 daily freight trains and also operates yards at Fort Lauderdale and at Hialeah in Miami.

At the time of the 1988 transaction, the parties contemplated future assumption of maintenance and dispatching responsibilities on the South Florida Line by FDOT pursuant to an Operating and Management Agreement – Phase B (OMAPB).⁸ That agreement was never implemented.⁹ FDOT now proposes to assume dispatching and maintenance responsibilities under a new Amended South Florida Operating and Management Agreement (Amended SFOMA),¹⁰ largely based on the Central Florida Operating and Maintenance Agreement the parties utilized and the Board considered in Florida Department of Transportation—Acquisition Exemption—Certain Assets of CSX Transportation, Inc. (FDOT/Orlando), FD 35110 (STB served Dec. 15, 2010).

In addition to implementing the Amended SFOMA, and in fulfillment of a 2001 agreement between CSXT and what is now SFRTA, CSXT proposes to contribute to FDOT an additional three-quarters of a mile of track at the north end of the South Florida Line (Contribution Segment). The Contribution Segment would be subject to the same retained permanent, exclusive freight easement and conditions that apply to the rest of the line.

On May 27, 2014, the Brotherhood of Railroad Signalmen (BRS) submitted to the Board comments in response to FDOT's petition. BRS does not oppose the petition because it believes the relevant parties are "bound by a '13(c) Agreement'"¹¹ that will protect the rights and interests of BRS-represented CSXT Signalmen who work on the South Florida [L]ine, including their retirement under the Railroad Retirement Act."¹²

⁸ Pet. 5.

⁹ Id.

¹⁰ On Dec. 6, 2007, the parties executed an original version of SFOMA; on Jan. 25, 2013, the parties executed an Amended SFOMA, which the parties intend to implement. Pet. 7; Pet. Ex. 1 at 4.

¹¹ A "13(c) Agreement" refers to an agreement under section 13(c) of the Federal Transit Act, codified at 49 U.S.C. § 5333(b), which provides for fair and equitable employee protective arrangements as a condition of federal financial assistance for various types of public transit projects.

¹² BRS Comments 2.

THE TRANSACTION

As noted above, FDOT acquired the physical assets of the South Florida Line from CSXT in 1988 pursuant to the Sale Contract and Warranty Deed. The Sale Contract provided that “CSXT retain, and not transfer to the State, a perpetual easement over the properties acquired by the State limited for the exclusive purpose of providing rail freight service”¹³ The Warranty Deed reserved to CSXT “an EASEMENT IN PERPETUITY . . . FOR RAILROAD PURPOSES . . . in, over, or on . . .” the South Florida Line.¹⁴ Perpetuity is defined as “until this Easement is abandoned or terminated, as provided in the [OMAPA]. . . .”¹⁵ The OMAPA has governed operations and maintenance on the South Florida Line since 1988.¹⁶

Under the current proposed transaction, the Amended SFOMA will replace the OMAPA. The Amended SFOMA reiterates that CSXT has the “exclusive right to use the [South Florida Line] for the exclusive provision of Rail Freight Service.”¹⁷ FDOT may not permit any other party to conduct freight service over the South Florida Line without CSXT’s prior written consent.¹⁸ The agreement also expresses the parties’ mutual intent that FDOT not become a rail carrier on the South Florida Line.¹⁹ The Amended SFOMA can only be terminated when “CSXT, its successors or assigns, secures and exercises appropriate regulatory authority to abandon and/or discontinue operations over the [South Florida Line].”²⁰ This includes termination in the event that a default is not cured.²¹

The Amended SFOMA establishes operating windows on the South Florida Line: (1) a daily passenger priority window from 5:00 am to 9:00 am and from 3:00 pm to 7:00 pm; (2) a daily freight priority window from 11:00 pm to 5:00 am; and (3) a daily mixed passenger/freight window from 9:00 am to 3:00 pm and from 7:00 pm to 11:00 pm.²² During the passenger

¹³ Pet. 10.

¹⁴ Pet. 10.

¹⁵ Pet. Ex. 6 at 4.

¹⁶ Pet. 4-5.

¹⁷ Pet. Ex. 10 at 7; Pet Ex.10 at 3, 5.

¹⁸ Pet. Ex. 10 at 19.

¹⁹ Pet. Ex. 10 at 4.

²⁰ Pet. Ex. 10 at 71.

²¹ Pet. Ex. 10 at 50-51 (establishing that in the event of a default that has not been cured, CSXT must still receive regulatory approval from the Board to discontinue operations or abandon the line).

²² Pet. 20.

priority window, CSXT freight trains can access and use the South Florida Line as long as those trains do not impede or delay commuter trains.²³ The mixed use window would be handled through a dispatching protocol mutually agreed upon by FDOT and CSXT, and “shall accommodate at least one and one-half (1.5) freight trains per hour in addition to all freight trains operating as of the Commencement Date”²⁴ “Betterments and additions, curfew and program work, construction, and signal suspension . . . will be performed in the hours from 5:00 am to 01:00 am . . . or within other operating windows if the work does not interfere with Freight Rail Service in CSXT’s reasonable judgment.”²⁵

Under the Amended SFOMA, FDOT would be responsible for track maintenance and repair on the South Florida Line in accordance with CSXT and federal standards, and best generally accepted industry standards.²⁶ If FDOT fails to fulfill its maintenance obligations, CSXT may conduct maintenance operations at FDOT’s expense.²⁷ Track speeds on the South Florida Line cannot be lowered without CSXT’s consent.²⁸

The Amended SFOMA also provides that FDOT would be responsible for the dispatching of all trains on the South Florida Line.²⁹ It establishes that trains would “be operated without prejudice or partiality to any party and in such a manner, as will afford the economical and efficient manner of movement of all trains”³⁰ During the mixed passenger/freight window, trains would be dispatched through a protocol mutually agreed to by the parties.³¹ Pursuant to an operating agreement between FDOT and SFRTA, SFRTA would perform maintenance and dispatching on FDOT’s behalf;³² SFRTA has contracted with Amtrak to actually perform dispatching.³³

²³ Pet. Ex. 10 at 19.

²⁴ Pet. Ex. 10 at 19.

²⁵ Pet. Ex. 10 at 19.

²⁶ Pet. Ex. 10 at 22; Pet. 23.

²⁷ Pet. Ex. 10 at 25; Pet. 23.

²⁸ Pet. Ex. 10 at 25.

²⁹ Pet. 24; Pet. Ex. 10 at 14.

³⁰ Pet. Ex. 10 at 18-20.

³¹ Pet. Ex. 10 at 19.

³² Pet. 7-8.

³³ Pet. 8, 14-15. The Amtrak contract can be renewed by SFRTA through 2017, after which Amtrak may bid on subsequent dispatching contracts. Pet. 15. By contract between

(continued...)

FDOT and CSXT also executed a Transition Agreement “in order to effect a smooth transition of the maintenance and dispatch obligations to [FDOT] from CSXT.”³⁴ The Transition Agreement is supplemental to the Amended SFOMA and OMAPA, does not alter, modify, or amend either agreement, and terminates upon the commencement of the Amended SFOMA.³⁵

Finally, the proposed Contribution Contract provides for CSXT’s contribution of the three-quarter mile Contribution Segment to FDOT; a proposed Quitclaim Deed accompanies the Contribution Contract.³⁶ The Quitclaim Deed reserves for CSXT, “an EASEMENT IN PERPETUITY . . . FOR RAILROAD PURPOSES . . . in, over or on” the Contribution Segment, subject to the OMAPA as amended by the Amended SFOMA.³⁷

DISCUSSION AND CONCLUSIONS

The acquisition of an active rail line and the common carrier obligation that goes with it ordinarily requires Board approval. Where the acquiring entity is a noncarrier, the standard for approval is set out in 49 U.S.C. § 10901. However, the State of Maine line of precedent holds that the sale of the physical assets of a rail line by a carrier to a state or other public agency does not constitute the sale of a rail line within the meaning of § 10901 when the selling carrier retains: (1) a permanent, exclusive freight rail operating easement giving it the right and common carrier obligation to provide freight rail service on the line; and (2) sufficient control over the line to carry out common carrier operations. E.g., FDOT/Orlando, slip op. at 5. When the seller retains the common carrier obligation and control over freight rail service, Board precedent holds that the purchaser of only the physical assets of a line does not become a carrier for the purposes of § 10901(a)(4). For a transaction to fall within that precedent, however, the terms of the sale must ensure that the selling carrier can continue to provide common carrier freight rail service without undue interference by the purchaser. Mass Dep’t of Transp.—Acquis. Exemption—Certain Assets of CSX Transp., Inc., FD 35312, slip op., at 5 (STB served May 3, 2010), aff’d sub nom. Bhd. of R.R. Signalmen v. STB, 638 F.3d 807 (D.C. Cir. 2011). To determine whether FDOT’s continued ownership of and assumption of dispatching and maintenance responsibility

(...continued)

SFRTA and FDOT, SFRTA is required to coordinate its maintenance and dispatch services with CSXT in accordance with the SFOMA. Pet. Ex. 13 at 12.

³⁴ Pet. Ex. 11 at 1.

³⁵ Pet. Ex. 11 at 1.

³⁶ Pet. 9.

³⁷ Pet. Ex. 9 at 2.

over the South Florida Line would cause FDOT to become a rail carrier, the Board looks to whether CSXT would retain a permanent, exclusive freight rail operating easement and would have sufficient interest in, and control over, the South Florida Line to permit it to carry out its common carrier operations.

The transaction, as proposed, does not require Board approval. Both the existing and the new agreements provide that CSXT would retain a permanent, exclusive freight rail operating easement over the South Florida Line to permit it to carry out its common carrier obligation. CSXT would not transfer its common carrier obligation to FDOT, and FDOT would not hold itself out as a common carrier performing common carrier freight rail service on the South Florida Line. The existing agreements were specifically designed so that FDOT would acquire only the railroad right-of-way and track assets. Nothing in the new agreements would change that arrangement.

We are satisfied that the freight rail easement retained by CSXT is permanent because, under the controlling agreements, freight rail services can only be terminated by obtaining Board authority to discontinue service over or abandon the freight easement.³⁸ This holds true even if there is a breach; CSXT's common carrier service over the South Florida Line cannot cease without the Board's regulatory authority to abandon or discontinue service.³⁹ The easement takes precedence and preserves CSXT's common carrier rights and obligations unless and until the Board approves a modification of that easement.

The agreements are not impediments to the continuation of common carrier freight rail service by CSXT. The Amended SFOMA sets forth operating windows during which priority will be given to freight or commuter rail passenger service according to the time of day. When priority is given to passenger service, freight trains can access the line as long as they do not impede or delay commuter trains. Specific limits are placed on work curfews, and the agreements include an extensive program of coordination and notification among FDOT, CSXT, and Amtrak. The Board has found that agreements that restrict freight rail operations to specific times in order to accommodate reliable commuter passenger service are permissible. See FDOT/Orlando, slip op. at 6; Md. Transit Admin.—Pet. for Declaratory Order, FD 34975, slip op. at 5-6 (STB served Oct. 9, 2007); Utah Trans. Auth.—Aquis. Exemp.—Union Pac. R.R., FD 35008, slip op. at 7 (STB served July 23, 2007). Here, current operations under the present agreement (OMAPA) are conducted under provisions that accommodate both passenger and freight trains. No shippers have submitted comments to the Board regarding the quality of freight service over the line. We find the restrictions in the agreements to be reasonable.

³⁸ Pet. Ex. 10 at 42.

³⁹ Pet. Ex. 10 at 50-51.

The SFOMA provides that FDOT would be responsible for track maintenance on the South Florida Line. FDOT is required to maintain the line to FRA Class 4 Standards, and to maintain all tracks, bridges, signals, and right-of-way in accordance with CSXT's geometry standards.⁴⁰ Train speeds on the South Florida Line cannot be lowered without CSXT's consent.⁴¹ CSXT has the right to inspect the South Florida Line to ensure FDOT's compliance with its maintenance obligations and, in the event that FDOT fails to fulfill its maintenance obligations, CSXT may perform the maintenance at FDOT's expense. Because CSXT would continue to have the ability to play an active role in the maintenance of the South Florida Line, we find FDOT's assumption of the track maintenance responsibilities reasonable.

Under the Amended SFOMA, FDOT would be responsible for dispatching all trains on the South Florida Line, subject to the provisions of the agreement that protect freight service. Trains will be dispatched "without prejudice or partiality to any party and in a manner, as will afford the economical and efficient manner of movement of all trains."⁴² Specific dispatching protocols for train movements during the mixed passenger/freight rail operating window would be mutually agreed to by the parties. The Board is satisfied that there is a legitimate business justification for placing dispatching and maintenance under the control of the noncarrier, given the significant capacity enhancements FDOT has made to the South Florida Line for Tri-Rail, Amtrak, and CSXT service, and the high volume of Tri-Rail service as compared to freight service. Further, as noted above, the BRS does not oppose the new agreement.⁴³ The Board finds that FDOT's continued ownership of the South Florida Line, and the assumption of dispatch and maintenance responsibility, would not circumvent the railway labor laws.

The addition of the three-quarter mile Contribution Segment to the approximately 81-mile South Florida Line does not alter this analysis. The Contribution Segment would be subject to the same agreements as the rest of the South Florida Line. Its addition would not give FDOT the ability to interfere unduly with CSXT's ability to fulfill its common carrier obligations.

We conclude that nothing in the transaction, as structured, would affect the continuing validity of CSXT's permanent, exclusive freight rail operating easement, or would otherwise permit FDOT or SFRTA to interfere unduly with CSXT's ability to fulfill its common carrier obligation. Therefore, the proposed transaction falls within the State of Maine line of precedent, and the continued ownership and assumption of maintenance and dispatching responsibility by

⁴⁰ Pet. 23.

⁴¹ Pet. 23.

⁴² Pet. Ex. 10 at 18.

⁴³ While BRS continues to dispute the legality of State of Maine, the legality of the doctrine was settled in Brotherhood of Railroad Signalmen v. Surface Transportation Board, 638 F.3d 807 (D.C. Cir. 2011).

FDOT would not constitute the acquisition of a railroad line under 49 U.S.C. § 10901(a)(4) or cause FDOT to become a rail carrier. Under these circumstances, we find that the proposed transaction does not require Board authorization under § 10901 or an exemption under § 10502.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. FDOT's petition for declaratory order is granted as discussed above.
2. This decision is effective on its service date.

By the Board, Chairman Elliott, Vice Chairman Miller, and Commissioner Begeman.